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Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER CO.

BRIEF IN OPPOSITION TO CERTIORARI

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I

THE COURT BELOW CORRECTLY INTERPRETED AND APPLIED THE SOUTH CAROLINA DECISIONS

Respondent submits that the opinion below is not subject to any of the errors charged against it. On the contrary, the opinion is a composite, logical and correct statement of the several rules applicable to an action of trespass *quare clausum fregit* under the law of South Carolina. It will be welcomed and appreciated by the bench and bar

of South Carolina because it brings together so many of the pertinent rules and states them in a logical and understandable way.

The brief filed for petitioner quotes (on page 14) a portion of a sentence from the opinion below, and by adding a capital P, without asterisks, indicates that this is a complete sentence. A consideration of the complete sentence, and even of the complete paragraph in question, is a fairer test of the opinion. It is difficult to see, when the paragraph is read as a whole, how it could be more clearly stated that plaintiff's right to recover on the trial was based "upon the injury to his possession."

Petitioner's quotation (page 14 of brief) from *Macedonia Baptist Church v. City of Columbia,* 195 S. C., 59, 10 S. E. (2d), 350, should be considered in connection with the facts of the case and the issue to which the South Carolina Supreme Court was speaking. The court said: "This is an action to recover damages alleged to have been caused by surface waters drained from the streets of the City of Columbia, and cast upon certain real estate owned by respondent. * * *" The question to which the court was speaking was thus quoted: "IV. Was one isolated deed from an individual, dated in 1914, sufficient by itself to prove plaintiff's title to the property in question?"

The undisputed evidence showed that the plaintiff church had received a deed to the lot of land in the City of Columbia on June 14, 1914, and had then erected and had since maintained, occupied and used a church building thereon until the flooding on July 16, 1938. The trial judge held, in denying a motion for a new trial, that plaintiff had proved title (evidently) by proving actual and adverse possession of the lot under claim and color of title for a continuous period of more than twenty years prior to the dam-

age. (This proved title by presumption of a grant.) The City did not claim either possession or title in itself. It was on these facts, and to the quoted question, that the court spoke in the paragraph from which petitioner quotes only a part. (Head notes 6, 7, 8; 195 S. C., at 70, 10 S. E. (2d), at 355.) In other words, the court was there dealing with a case in which plaintiff had proved not only title, with constructive possession as an incident thereof, but also actual possession as of the time of the damage.

A reading of the complete paragraph of the opinion, with the above facts and question in mind, will dispel any suggestion of inconsistency therewith in the opinion below. In his quotation in the brief here petitioner has omitted the last clause of the last-quoted sentence, without indicating such omission. The omitted clause reads "and no one had offered to show any paramount title to it."

TITLE TO REAL ESTATE CANNOT BE PROVED BY PAROL

The petition and supporting brief charge the court below with making rulings that it did not make. Among these is the assertion (page 19) that the court ruled that parol testimony was inadmissible to prove possession of the 106.5-acre tract of land in question by plaintiff's mother, father and grandfather. The court below did not make such a ruling.

The record tends to confuse, because plaintiff was attempting to prove paper title, title by adverse possession for twenty years giving rise to the presumption of a grant, title by adverse possession for ten years, and actual possession as of the time of the alleged trespass in September, 1941, all at the same time. Plaintiff's theory as to his chain of title—which he first disclosed on the trial, to the

complete surprise of defendant—was that it went through his mother, back to his father and then back to his grandfather. Plaintiff introduced the deed from his mother dated and recorded in 1920, with the attached plat (R. 70). Plaintiff also introduced the deed from his grandfather to his father, dated and recorded in 1888, covering two tracts—one of 248 acres, plus another of 72 acres, making a total of 320 acres (R. 97). The link between plaintiff's father and mother was missing. Plaintiff was faced with two substantial difficulties in closing this link. First, was the persuasive, if not conclusive, evidence offered by defendant *contra* the identity of the two tracts of land, and, second, that there was no deed of record from plaintiff's father to his mother. It was in connection with plaintiff's effort to overcome the second difficulty, that plaintiff offered the parol testimony to prove that the title passed from his father to his mother, and that there was a deed from his father to his mother in 1917. This is the testimony that the court below held should have been excluded by the district court on defendant's objection and stricken on defendant's motion. Plaintiff testified in driblets at pages 5, 6, 7, 9 and 14; plaintiff's witness Harrison at page 28; and plaintiff's brother at page 37. The motions to strike are found at pages 57-58. The record became confusing, and patience was required to keep it straight. The learned trial judge became impatient and then confused.

Appellant's brief in the court below (pages 31-37) argued that the evidence was inadmissible because

(a) Title to real estate cannot be proved by parol, citing *Spence v. Spence*, 4 S. C. L. (2 Brev.), 460, 461; *Mayo v. R. R. Co.*, 40 S. C., 517, 519, 19 S. E., 73; *Metz v. Metz*, 48 S. C., 472, 488, 26 S. E., 7; *Luco v. United States*, 64 U. S. (23 How.), 515, last paragraph on 543, 16 L. Ed., 545,

last paragraph on 551; *Hayes v. United States*, 175 U. S., 248, 257, 44 L. Ed., 150, 154; and

(b) Parol evidence of a deed—particularly an unrecorded deed—was admissible only upon prior proof (1) of the existence of the deed, including the execution thereof, (2) that the deed had been lost or destroyed without plaintiff's fault, and (3) that an appropriate search had been made therefor, citing, amongst other cases, *Floyd v. Mintsey*, 39 S. C. L. (5 Rich. L.), 361, 373; *O'Neal v. Isbell*, 43 S. C. L. (9 Rich. L.), 367, 370; and *Uzzell v. Horne*, 71 S. C., 426, 431, 51 S. E., 253.

It was with these authorities before it that the court below held that this testimony was improperly admitted and retained in the case, although the court evidently did not think it necessary to cite authority to support such elementary propositions [page 4 of printed opinion; 153 F. (2d), 578 (4)].

Defendant made a motion for new trial on after-discovered evidence in the district court and submitted therewith copies of two instruments from the registry office for Dorchester County certified by the clerk of court. The first was a mortgage from plaintiff's father to one J. H. Cone, dated and recorded in 1928, and the second was a deed from plaintiff's father to one Owen C. Cone, dated and recorded in 1932. Both instruments covered all the land conveyed to plaintiff's father by the deed of plaintiff's grandfather in 1888, carried a covenant of general warranty by plaintiff's father, and the deed was a conveyance in fee simple (R. 114, 120).

The court below did not find it necessary to pass on the denial of this motion [page 10, printed opinion; 153 F. (2d), 581 (11, 12)], but respondent submits on the gen-

eral view of the case that this record evidence is conclusive that plaintiff's father did not execute a deed to plaintiff's mother in 1917, or at any other time, covering a portion of the land conveyed to plaintiff's father by the deed from plaintiff's grandfather in 1888.

DEFENDANT WAS ENTITLED TO JUDGMENT ON THE EVIDENCE

An analytical consideration of the evidence in the record will, it is submitted, convince any court that plaintiff utterly failed to prove either constructive possession based on title, or actual possession at the time of the alleged trespass, and that, in addition thereto, the entire evidence admits only of the reasonable inference that defendant has been in actual possession from the date of its entry under its deed in 1924.

Under the substantive rule recently restated in *Littleton v. Roberts*, 181 S. C., 303, 187 S. E., 349, and therein applied (by a similar direction for entry of judgment in favor of defendant in the trial court), as well as under the other South Carolina cases cited in the opinion, there was no other course for the court below to pursue, since the opinion shows that it viewed plaintiff's proof as charitably as possible. The following quotation from *Ætna Casualty & S. Co. v. Yeatts*, decided August 22, 1941, 122 F. (2d), 350, 352, indicates that the court below knew the proper test:

> "* * *; for it is too well settled to warrant discussion that, on such motion, the evidence must be taken in the light most favorable to the party against whom the directed verdict is asked and that all conflicts must be resolved in his favor. * * *"

AS TO RES ADJUDICATA

The petition asserts (page 5) "that the entry of judgment for defendant, through the medium of *res adjudicata*, forever declared title to the disputed lands in the defendant * * *." This is again asserted on page 6 and again in the brief (page 24). Petitioner need have no such fear.

In *Littleton v. Roberts, supra*, the Supreme Court of South Carolina said:

> "This is not an action to try title, nor is it an action to recover possession of real estate.
>
> "Admittedly it is an action in trespass *quare clausum fregit.* * * *" (181 S. C., 305, 187 S. E., 350.)

Again:

> "It is not to be understood that anything contained in this opinion has any bearing on plaintiff's right to bring her action in another form, if she be so advised. We hold simply that the action may not be maintained in this form.
>
> "The judgment is reversed, and the case is remanded, with instruction to enter judgment for defendant under Rule 27." (181 S. C., 310, 187 S. E., 352.)

The doctrine of *res adjudicata* does not apply in South Carolina to actions for recovery of real estate or possession thereof at common law. By the Act of 1879 (now section 374 (2) of the Code of 1942), "plaintiff in all actions for recovery of real property, or the recovery of the possession thereof," is limited to two actions, with a proviso that the costs of the first be paid and that the second be brought within two years. (Quoted in Appendix E.) See *Carr v. Mouzon*, 93 S. C., 161, 76 S. E., 201.

II

THE GROUNDS OF THE MOTION WERE SUFFICIENTLY STATED UNDER RULE 50(a)

Petitioner (page 20 of brief) quotes only a portion of the motion for a directed verdict (R. 58), and then asserts that "The grounds for directed verdict moved by the defendant were not based on superior possession of the defendant, but on superior title."

The motion to direct a verdict was really a continuation of the motion to dismiss, made at the conclusion of plaintiff's testimony, both as to the grounds thereof and as to the argument thereon. Defendant in its testimony had proved its deed in 1924 and actual and continuous possession of the land in question from that date down to the trespass in 1941, so that there was additional testimony before the court, when the motion to direct a verdict was made, going to disprove plaintiff's claim of either title or possession. This was affirmative evidence tending to show title and possession in defendant and thereby negativing either title or possession in plaintiff at the time of the trespass.

The grounds of the motion to dismiss are quoted (R. 56) as follows:

1. The plaintiff has failed to prove that he has title to the property.

2. The plaintiff has failed to prove that he had possession of the property at the time of the alleged trespass.

3. That the plainfiff has failed to prove that the defendant, in September, 1941, cut, removed and sold the timber alleged to have been cut.

The trial judge, after disposing of the third ground (which is not pertinent here), said (R. 57):

"I don't think the plaintiff has put up very strong possession testimony but he said he had been on and off the property for a great many years.

"(After further argument by Mr. Waring on the three grounds.)

"I shall refuse the motion."

When we come to the motion for a directed verdict (R. 58), we find the stenographic transcript to be sketchy; apparently defendant's attorney made some remarks which the stenographer omitted and others which she summarized. The motion was made in sections, because the trial judge interrupted counsel, from time to time, to express his views as to the effect of the testimony.

After stating the general ground of the motion, defendant's attorney said "The motion is based somewhat on the same argument that was presented to your Honor on the motion to dismiss," and then went on to assert, first, that defendant's proof substantiated title in defendant and not in plaintiff. There was further argument following this assertion which was not taken down by the stenographer. The trial judge then interposed remarks *in re* the effect of plaintiff's testimony, as to both possession and title (at bottom of page 58), and, following a statement by counsel, the trial judge recalled that plaintiff "said he went on there and cut some boards and hunted," etc. Thereupon defendant's attorney argued "as to showing of possession of this property in September, 1941" (R. 59). The trial judge replied that plaintiff "doesn't have to show possession that month;" then discussed defendant's evidence of possession, and ended with a reference to plaintiff's argument that defendant's evidence showed a mere illegal entry and

not possession (R. 59). Following this colloquy, the motion for directed verdict was completed by defendant's attorney by reference to the third ground of the motion to dismiss, which is not pertinent here. Following this, the trial judge made his ruling on the motion, to wit (R. 60):

> "THE COURT: I passed on the proposition yesterday. If I was wrong yesterday I am wrong today. I think this is a jury question. I am not going to discuss how strong or how weak it may be, it is not necessary for me to do that. It is an issue of fact. Motion refused. I assume Mr. Waring notes an exception."

The test whether a motion for a directed verdict states the specific ground therefor within the meaning of Rule 50(a) is well stated in *Virginia Carolina T. & W. Co. v. Dunbar* (C. C. A. 4th), 106 F. (2d), 383, 385: "* * * And we think it important that this requirement of the rule be observed, particularly in view of the enlarged powers granted the court with respect to such motions by rule 50(b), as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been suggested when the motion was made. We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto. * * *"

This statement was quoted with approval and this test followed in *Ryan Distr. Co. v. Caley* (C. C. A. 3rd), decided January 17, 1945, 147 F. (2d), 138, 140, and the court added: "The basis of the motion was perfectly clear to both court and parties both in the trial court and upon this appeal."

The district court and opposing counsel both understood that the motion to direct renewed the grounds of the motion to dismiss, to wit, that plaintiff had failed to prove either title or possession as of the time of the trespass. Opposing counsel below voiced no request for amplification or clarification of the grounds of the motion, or of the reasons upon which the motion was refused, and, having failed to speak then and there, should not be heard to complain here.

THE CIRCUIT COURT OF APPEALS HAD POWER TO DIRECT ENTRY OF JUDGMENT UNDER RULE 50(b) NOTWITHSTANDING THAT DEFENDANT HAD MADE NO MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO

The opinion below cites an article by Judge Dobie, "The Revision of the Federal Rules of Civil Procedure," 30 Va. L. Rev., 513, 520, dated September, 1944. The portion of the article relating to Rule 50(b) is printed as Appendix A hereto.

The opinion below also cites *United States v. Halliday* (C. C. A. 4th), 116 F. (2d), 812, 815, reversed on other grounds, 315 U. S., 94, 86 L. Ed., 711—opinion by Judge Dobie, wherein he quotes the remarks of Hon. Wm. D. Mitchell, Chairman of the Advisory Committee for this Court, of which Judge Dobie was a member, as follows: "We do not by this rule make it necessary for the trial court even to say, 'I am reserving the question of law.' That is a form anyway, and we make it safe in all cases by the device of prescribing that wherever he refuses to grant a motion for directed verdict he is deemed to reserve the question of law, taking the verdict subject to his later determination, and consequently may on motion after-

wards set aside the verdict, grant judgment notwithstanding, and the Circuit Court of Appeals may take the same action."

This Court has said that it may consider the meaning of the Rules, "But in ascertaining their meaning the construction given to them by the Committee is of weight." *Mississippi Pub. Corporation v. Murphree*, decided January 2, 1946, —— U. S.; ——, 90 L. Ed., 207, 210.

United States v. Wimbish (C. C. A. 4th), 154 F. (2d), 773—opinion also by Judge Dobie—is another illustration of the interpretation and application of Rule 50(b) by the court below. The status of the record there persuaded the court that there should be a new trial because the district court had not reached a decision on the many disputed questions of fact involved in the case.

Since the opinion of this Court came down in *Halliday v. United States*, on January 19, 1942, 315 U. S., 94, 95, 86 L. Ed., 711, 716, wherein *Berry v. United States* and *Conway v. O'Brien* were referred to, *certiorari* was denied on April 27, 1942, in *Howard Univ. v. Cassell* (C. C. A. D. C.), 126 F. (2d), 6; and a rehearing therein was denied May 25, 1942. 316 U. S., 675, 86 L. Ed., 1749.

The only case exactly in point that respondent finds since then is *Lowden v. Belt* (C. C. A. 8th), decided October 11, 1943, 138 F. (2d), 558. This is entirely in line with the opinion below.

Montgomery Ward & Co. v. Duncan, 311 U. S., 243; 85 L. Ed., 147, dealt with various phases of Rule 50(b), but not the exact point here involved. Appended to that case in 85 L. Ed., is an extensive note as to Rule 50(b), the pertinent section of which is found under the heading "g. Necessity of motion for judgment." (page 166), which col-

lects the cases to that time; but the author cites none that is not referred to herein.

AS TO THE PRACTICE IN SOUTH CAROLINA

The result in this case would have been the same if it had been tried in the courts of South Carolina—that is to say, the Supreme Court, having reversed the trial court for denying defendant's motion to direct a verdict in its favor, would have remanded the case for entry of judgment in favor of defendant under its Rule 27. (This rule has been in effect almost forty years, with some changes not material here; it is printed as Appendix B hereto.)

This is the course followed by the Supreme Court of South Carolina in *Littleton v. Roberts, supra,* 181 S. C., 303, 187 S. E., 349. In its consideration of the substantive law the court below properly found this case to be directly in point and conclusive on this phase of the evidence (page 11 printed opinion; 153 F. (2d), 581 (11, 12)).

Prior to 1942, the Circuit Court, which is the trial court in South Carolina, had only the right to grant a new trial, or a new trial *nisi,* following the verdict of a jury, although the court had refused a motion for a directed verdict made during the trial. The trial judges had come to think that when a motion to direct a verdict was made, the trial judge should have the power to reserve decision thereon, submit the case to the jury, and, following the verdict, call up the motion for a directed verdict for decision; and, in the event that the same was granted, set aside the verdict and enter judgment for the moving party. Following the decision of this court in *Baltimore & Co. Line v. Redman,* 295 U. S., 654, 79 L. Ed., 1636, some of the trial judges commenced to follow this practice. The Supreme Court, however, frowned thereon, taking the view that both parties were en-

titled to a decision of the motion as and when made and that the jury might be influenced by the reservation of decision. *Clardy v. Sovereign Camp,* 193 S. C., 444, 446, 8 S. E. (2d), 748; *Phillips v. Western Union Tel. Co.,* 194 S. C., 317, 321, 9 S. E. (2d), 736. (Both these cases happen to be additional illustrations of the usual direction for entry of judgment given by the Supreme Court under its Rule 27. See 193 S. C., at 456, and 194 S. C., at 327.) The circuit judges, however, persisted in their view, and at a conference of the judges of both courts, held pursuant to the section now 904 of the Code of 1942 (quoted in Appendix C), Circuit Court Rule 79 was adopted in 1942 (quoted in Appendix D).

This history seems to make it clear that the rule allowing a motion for judgment *non obstante veredicto* was adopted to increase the power of the trial judge— that is, to allow him to reserve his decision on the motion for a directed verdict, and to decide and make this effective later, as justice might require.

The adoption of Circuit Court Rule 79 did not have, and has not had, the slightest effect on the power of the Supreme Court of South Carolina to act under its Rule 27. Since the adoption of Rule 79 in 1942, the power of the Supreme Court under its Rule 27 has been the same as it was before. It is immaterial to the jurisdiction of the Supreme Court under its Rule 27 whether the appealing party made or failed to make a motion for judgment *non obstante veredicto* in the trial court, provided that he duly made a motion for a directed verdict at the appropriate time during the trial. *Bell v. A. C. L. R. Co.,* decided February 2, 1943, 202 S. C., 160, 176—note that the concurring opinion of Judge Fishburne (page 176) is the opinion of the court; 24 S. E. (2d), 177.

This is persuasive that the construction given Rule 50(b) by the court below was correct. The portion of the rule allowing a motion for judgment *non obstante veredicto* was not made to affect the power of the appellate court; that power is complete when the motion for a directed verdict is made under Rule 50(a) and the decision reserved thereon by the first sentence of Rule 50(b). The remainder of Rule 50(b) affects only the power of the district judge; nothing more is needed to complete the power of the appellate court.

In *Berry v. United States, supra,* 312 U. S., 450, 452, 85 L. Ed., 945, 947, this Court suggested that the Circuit Court of Appeals were not then in complete agreement; and the reference note cites three cases. Of these, *Conway v. O'Brien* and *United States v. Halliday* have been already referred to. The third case is *Pruitt v. Hardware Dealers Mut. F. Ins. Co.* (C. C. A. 5th), 112 F. (2d), 140. That case does not seem to be inconsistent with the particular phase of Rule 50(b), making the specific question thereunder, that arises here and is discussed in the cases cited herein. Another opinion of the court below [*Etna Cas. & S. Co. v. Yeatts,* decided August 22, 1941, 122 F. (2d), 350] might be read in this connection. It emphasizes the distinction between the exact point decided in the *Pruitt case* and the point involved here.

Counsel for respondent respectfully submit that the exact phase of Rule 50(b) here involved has been correctly and uniformly construed and applied by all the Circuit

Court of Appeals and that there is no reason for this Court to grant *certiorari*.

Respectfully submitted,

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